

August 19, 2009 Session

Direct Appeal from the Criminal Court for Davidson County
No. 2001-D-2182 Seth Norman, Judge

No. M2008-02361-CCA-R3-PC - Filed December 9, 2009

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Criminal Court Affirmed

Fikisha Swader, Nashville, Tennessee, for the Appellant, Michael Lewis.

Robert E. Cooper, Jr., Attorney General and Reporter; Michael E. Moore, Solicitor General; Lacy Wilber, Assistant Attorney General; Victor S. Johnson, III, District Attorney General; Dan Hamm, Assistant District Attorney General, for the Appellee, State of Tennessee.

A. Trial

In our opinion on the Petitioner's direct appeal, we recited the facts underlying his convictions as follows:

Factual Background

On June 14, 2001, Officer Wesley Charles Tilley ("the victim") of the Metropolitan Nashville Police Department attempted to pull over a vehicle with expired license tags and broken tail lights. The victim saw three occupants in this vehicle, which were later identified as [the Petitioner], Mr. Eric Hazlitt, and Mr. Steve Radley. When the victim activated his emergency equipment, the suspects' vehicle accelerated to a high rate of speed. During the pursuit, the [Petitioner] instructed the driver not to stop because he did not want to go back to prison. The driver obeyed the [Petitioner's] orders, and the victim continued pursuing the vehicle for approximately two miles. The driver attempted to pull over twice, but the [Petitioner] continued to instruct him not to do so. Eventually, the [Petitioner] told the driver to pull over, and the driver drove the car into the side of a building and stopped. The three occupants exited the vehicle. They all ran in different directions, and the victim pursued the [Petitioner] on foot. At one point during this foot pursuit, the victim and the [Petitioner] passed under a street lamp, and the [Petitioner] turned around, giving the victim a clear view of the [Petitioner] from approximately eight feet away.

As the foot pursuit continued, the Defendant ran to the top of a hill and dropped to his stomach in a prone position. As the victim ran up the hill, the Defendant opened fire upon the victim from only five or six feet away. The victim was shot five times-twice in the chest, twice in the arm, and once in the back as he was trying to retreat. Although the victim's protective vest stopped three of the bullets from penetrating his torso, he sustained serious wounds from all five bullets, including a bullet that went entirely through his upper left arm. Immediately after the shooting, the Defendant lost one of his shoes and his eyeglasses and dropped his weapon. The victim attempted to continue pursuing the Defendant but was unable to do so due to his injuries.

When investigating officers arrived on the scene, the victim provided them with a description of the suspect, the location of the shooting, and the suspect's direction of flight. Officers used canine units and were able to find the missing shoe, a gun, spent shell casings, and blood. As the officers and the canine units continued to search the area, they found the Defendant hiding underneath a stairwell. Although the Defendant refused to surrender, the officers managed to apprehend and arrest him.

Procedural History

The Defendant was subsequently indicted for attempted first degree murder on November 2, 2001. On December 9, 2004, the Defendant sent a motion to dismiss for failure to bring him to trial expeditiously to the Assistant District Attorney, the Attorney General, and the Chief Justice of the Tennessee Supreme Court. His attorney also filed a motion to dismiss for the lack of a speedy trial on February 8, 2005. At the hearing on the motion to dismiss, the Defendant testified that his defense suffered prejudice because two potential defense witnesses-Mr. and Mrs. Keith Covington-were now deceased as a result of a murder-suicide. The Defendant contended that these witnesses were present when the Defendant got into the vehicle with the two other occupants, Mr. Hazlitt and Mr. Radley. The Defendant further contends that Mr. and Mrs. Covington would have testified that the Defendant did not have a gun on his person, but that Mr. Hazlitt and Mr. Radley were both armed. On cross-examination, the Defendant admitted that Mr. and Mrs. Covington were not passengers in the vehicle, were not present at the time and place of the shooting, and would have had no way of knowing for certain whether the Defendant was armed when he entered the vehicle. The trial court denied the motion to dismiss for lack of a speedy trial on February 25, 2005. The Defendant's trial began on February 28, 2005, and concluded on March 1, 2005.

A jury convicted the Defendant, and he was sentenced as a career offender to sixty years in the Department of Correction at sixty percent. *See* Tenn. Code Ann. § 40-35-108(a)(2). The trial court ordered this sentence to run consecutive to a prior sentence because he was a "professional criminal" with an "extensive" criminal record. *See* Tenn. Code Ann. § 40-35-115(b)(1)-(2).

Lewis, 2006 WL 2738160, at *1-2. This Court affirmed the trial court's judgments. *Id.* at *1.

B. Post-Conviction Hearing

The Petitioner timely filed a petition for post-conviction relief, amended by appointed counsel, in which he alleged that he received the ineffective assistance of counsel and that the trial court improperly made him choose between his right to a speedy trial and his right to effective counsel. At the hearing on the Petitioner's petition, the following evidence was presented: The Petitioner testified the shooting in this case occurred in 2001, and he was originally represented by the public defender's office. The Petitioner said he asked his public defender to file a motion to dismiss based on a violation of his right to a speedy trial, and the public defender then withdrew from representing him. Although the trial court indicated that the trial might be delayed due to the appointment of new counsel, it appointed a new attorney, ("Counsel"), in January 2005 and tried the Petitioner in February 2005.

The Petitioner testified that, during the five weeks Counsel represented him, Counsel met with him three times, but the two only discussed his impending hearing on his motion for a

speedy trial and not the trial itself. The hearing on the speedy trial motion was on the Friday before the Monday his trial began, and the Petitioner said he did not meet with Counsel that weekend.

The Petitioner said he never met with a private investigator at Counsel's request, and he never received any investigation reports. He said he received the police reports but explained that the public defender's office gave the reports to him. The Petitioner did not recall reviewing the discovery packet with Counsel, and he said the two did not discuss all the participants in the shooting. The Petitioner thought his case would be a complicated case in that it involved a police officer shooting. The Petitioner said he was disappointed Counsel did not introduce the portion of the police report that described how the Petitioner was bitten by the police dogs. This evidence, however, was not introduced at his trial.

The Petitioner testified he thought Counsel was a good attorney, and the two worked well together. He said, however, that Counsel did not have a lot of time to prepare for his trial and did not know all of the relevant facts of his case. The Petitioner said that the theory of defense he and Counsel agreed to assert was that the shooting was done by someone other than him. The Petitioner said one officer had said that there could have been four people in the car and that it was dark so he was not sure. The Petitioner recalled that one of the participants, Eric Hazlitt, mentioned in his confession to police that Hazlitt's brother, Kenny Mooreland, was located near the shooter and was shot at by police. The State alleged at trial that Mooreland was not in the car when it was stopped and was not involved in the shooting. The Petitioner asserted that Mooreland was the actual shooter and explained that he did not originally identify him to police because he panicked when he did not have his glasses. The Petitioner, however, agreed with Counsel that they would focus on Mooreland being the shooter in their defense. The Petitioner recalled that, when Hazlitt testified at trial, Counsel did not cross-examine him about Mooreland's presence at the crime scene. Counsel instead blamed the shooting on Hazlitt, which the Petitioner said was not supported by the evidence.

The Petitioner testified that he questioned Counsel about why he had not cross-examined Hazlitt about Mooreland. Counsel told him he did not cross-examine Hazlitt because he planned to call him to testify and question him on direct examination. Counsel also told him that he had subpoenaed several officers on the scene to identify inconsistencies in their statements. The Petitioner recalled that Counsel never recalled Hazlitt and that he in fact called no witnesses on the Petitioner's behalf. Counsel did not inform the Petitioner of his decision not to call additional witnesses until Counsel rested his case, turned to the Petitioner and said, "I think we did all we can do." The Petitioner believed that, had the additional witnesses testified, the proof would have shown that a K-9 attacked him, and the police assaulted him. The Petitioner thought this evidence would have affected the jury's verdict. The Petitioner testified that Counsel said he would file a motion to suppress the Petitioner's statement but that Counsel never filed this motion.

On cross-examination, the Petitioner recalled that his co-defendant testified against him and that the victim identified him. The Petitioner conceded that Counsel cross-examined the victim about his failure to identify the Petitioner before trial. The Petitioner admitted that he was in the car on the night of this shooting but denied that he made the statement that he was not going back to jail. The Petitioner maintained that four people were in the car: Hazlitt, who was driving, Steve Riley, Kenny Mooreland, and himself. The Petitioner denied that he had a gun but admitted that he was found hiding two streets from where the shooting occurred.

The Petitioner denied that Counsel discussed with him whether his case could be continued. He testified he asked Counsel if they needed more time, and Counsel told him that, because they were arguing a motion to dismiss for violating his speedy trial rights, they could not ask for a continuance.

Counsel testified he represented the Petitioner at his trial and was appointed to represent him six weeks before the trial began. Counsel initially thought that he would not be prepared for trial in that short period of time, but, after reviewing the discovery, investigating the case himself, and meeting with the State's attorney, he determined that he could prepare for the trial as scheduled. He said that, while the case was a police shooting, it was not extremely complicated. Much of the evidence came from one officer, the victim, who testified unequivocally that the Petitioner shot him. Counsel attempted to bring up inconsistencies in the witnesses' testimony to support his theory that the Petitioner was not the shooter. Counsel recalled that the Petitioner did not testify on his own behalf because of his lengthy criminal history. Counsel recalled the State offered the Petitioner seventeen years in exchange for a guilty plea, but the Petitioner refused this offer and maintained his innocence.

Counsel said that, at trial, he was not surprised or shocked by any of the evidence, although the trial court admitted one photograph of the Petitioner he had not seen before. He was able to use that picture to prove that the police had beaten the Petitioner, and the Petitioner consequently was found not guilty of the assault charge he faced.

On cross-examination, Counsel testified that the Petitioner faced a serious charge and a severe punishment, especially considering his lengthy criminal history. Counsel said that he met with the Petitioner twice in prison and that he probably met with him before each court appearance. He conceded that there may have been only one scheduled court appearance, which was the Friday before the trial began on Monday. Counsel maintained that he met with the Petitioner enough that he was comfortable to go forward at trial.

Counsel testified his theory of defense was that there were three other people were in the car and that one of these three, and not the Petitioner, was the shooter. The police reports were inconsistent, and some of the police reports indicated that there were, in fact, four people in the car. Counsel said his notes indicated that he wanted to highlight for the jury during his opening statement that four people were in the car. His notes indicated that he did not mention this to the jury during his closing statement. Counsel explained that he instead relied upon other

discrepancies in the witnesses' testimony. Counsel said he did not subpoena the officers who reported seeing four individuals in the car because he thought the State would subpoena them. Counsel agreed that he did not cross-examine Hazlitt about a fourth person present in the car, but instead blamed Hazlitt for the shooting.

Counsel agreed that multiple suspects sometimes made a case more complicated because each suspect should be investigated. Counsel agreed that there was a police report that reflected that the Petitioner complained he was struck by a police officer while he was restrained in a hospital being treated for the K-9 dog bite. Counsel agreed that he did not attempt to contact Mooreland, who the Petitioner claimed was the shooter in this case.

On redirect examination, Counsel testified that whether three or four suspects were in the car did not matter because his theory was simply that the Petitioner did not shoot the victim. He said there were ten to twelve police reports, but many of those reports were written by the same officer.

On recross-examination, Counsel agreed that the existence of a fourth additional suspect would have been good for the Petitioner.

Based upon this evidence, the trial court dismissed the Petitioner's petition for post-conviction relief. It is from this judgment that the Petitioner now appeals.

II. Analysis

On appeal, the Petitioner contends Counsel was ineffective for: (1) failing to secure adequate time in which to prepare for trial; (2) failing to make a thorough investigation of the law, discovery, and facts surrounding the Petitioner's case; and (3) failing to fully discuss and advise the Petitioner about defense strategies and tactical choices. The Petitioner also contends that the trial court erred because it forced him to elect between his right to a speedy trial and his right to effective counsel.

A. Assistance of Counsel

In order to obtain post-conviction relief, a petitioner must show that his or her conviction or sentence is void or voidable because of the abridgment of a constitutional right. T.C.A. § 40-30-103 (2006). The petitioner bears the burden of proving factual allegations in the petition for post-conviction relief by clear and convincing evidence. T.C.A. § 40-30-110(f) (2006). Upon review, this Court will not re-weigh or re-evaluate the evidence below; all questions concerning the credibility of witnesses, the weight and value to be given their testimony and the factual issues raised by the evidence are to be resolved by the trial judge, not the appellate courts. *Momon v. State*, 18 S.W.3d 152, 156 (Tenn. 1999); *Henley v. State*, 960 S.W.2d 572, 578-79 (Tenn. 1997). A post-conviction court's factual findings are subject to a de novo review by this Court; however, we must accord these factual findings a presumption of correctness, which can

be overcome only when a preponderance of the evidence is contrary to the post-conviction court's factual findings. *Fields v. State*, 40 S.W.3d 450, 456-57 (Tenn. 2001). A post-conviction court's conclusions of law are subject to a purely de novo review by this Court, with no presumption of correctness. *Id.* at 457.

The right of a criminally accused to representation is guaranteed by both the Sixth Amendment to the United States Constitution and article I, section 9, of the Tennessee Constitution. *State v. White*, 114 S.W.3d 469, 475 (Tenn. 2003); *State v. Burns*, 6 S.W.3d 453, 461 (Tenn. 1999); *Baxter v. Rose*, 523 S.W.2d 930, 936 (Tenn. 1975). The following two-prong test directs a court's evaluation of a claim for ineffectiveness:

First, the [petitioner] must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the [petitioner] by the Sixth Amendment. Second, the [petitioner] must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the [petitioner] of a fair trial, a trial whose result is reliable. Unless a [petitioner] makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable.

Strickland v. Washington, 466 U.S. 668, 687 (1984); *State v. Melson*, 772 S.W.2d 417, 419 (Tenn. 1989).

In reviewing a claim of ineffective assistance of counsel, this Court must determine whether the advice given or services rendered by the attorney are within the range of competence demanded of attorneys in criminal cases. *Baxter*, 523 S.W.2d at 936. To prevail on a claim of ineffective assistance of counsel, a petitioner must show that "counsel's representation fell below an objective standard of reasonableness." *House v. State*, 44 S.W.3d 508, 515 (Tenn. 2001) (citing *Strickland*, 466 U.S. at 688).

When evaluating an ineffective assistance of counsel claim, the reviewing court should judge the attorney's performance within the context of the case as a whole, taking into account all relevant circumstances. *Strickland*, 466 U.S. at 690; *State v. Mitchell*, 753 S.W.2d 148, 149 (Tenn. Crim. App. 1988). The reviewing court must evaluate the questionable conduct from the attorney's perspective at the time. *Strickland*, 466 U.S. at 690; *Hellard v. State*, 629 S.W.2d 4, 9 (Tenn. 1982). In doing so, the reviewing court must be highly deferential and "should indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Burns*, 6 S.W.3d at 462. Finally, we note that a defendant in a criminal case is not entitled to perfect representation, only constitutionally adequate representation. *Denton v. State*, 945 S.W.2d 793, 796 (Tenn. Crim. App. 1996). In other words, "in considering claims of ineffective assistance of counsel, 'we address not what is prudent or appropriate, but only what is constitutionally compelled.'" *Burger v. Kemp*, 483 U.S. 776, 794 (1987) (quoting *United States*

v. Cronin, 466 U.S. 648, 665 n.38 (1984)). Counsel should not be deemed to have been ineffective merely because a different procedure or strategy might have produced a different result. *Williams v. State*, 599 S.W.2d 276, 279-80 (Tenn. Crim. App. 1980). The fact that a particular strategy or tactic failed or hurt the defense does not, standing alone, establish unreasonable representation. *House*, 44 S.W.3d at 515 (citing *Goad v. State*, 938 S.W.2d 363, 369 (Tenn. 1996)). However, deference to matters of strategy and tactical choices applies only if the choices are informed ones based upon adequate preparation. *House*, 44 S.W.3d at 515.

If the petitioner shows that counsel's representation fell below a reasonable standard, then the petitioner must satisfy the prejudice prong of the *Strickland* test by demonstrating "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694; *Nichols v. State*, 90 S.W.3d 576, 587 (Tenn. 2002). This reasonable probability must be "sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694; *Harris v. State*, 875 S.W.2d 662, 665 (Tenn. 1994).

1. Trial Preparation

The Petitioner first contends that Counsel was ineffective because he failed to secure adequate time in which to prepare for trial. He asserts Counsel should have asked for a continuance because he was appointed only forty-six days before trial. The State counters, first, that the Petitioner has failed to show that Counsel was ineffective and, second, that he has failed to demonstrate prejudice from Counsel's conduct..

While forty-six days is a short period of time in which to prepare for an attempted first degree murder case, all the parties agree that there were extenuating circumstances. The Petitioner demanded that his public defender file a speedy trial motion on his behalf, contending that the public defender had requested, or agreed to, multiple continuances over his objection. Because the public defender would not file such a motion because the motion would be blaming the public defender's office for the delay, the public defender moved to withdraw as the Petitioner's counsel. The trial court granted this motion and appointed Counsel to represent the Petitioner.

At the hearing where the public defender was allowed to withdraw, the trial court noted that the Petitioner would have a hard time pursuing a speedy trial motion and asking for a continuance based upon new counsel being appointed. After Counsel was appointed, he inquired whether the Petitioner wanted to pursue the speedy trial motion, and the Petitioner affirmed that he did. Counsel informed the Petitioner that he could not argue for a speedy trial and a continuance at the same hearing. He and the Petitioner chose to pursue the speedy trial motion.

Counsel testified that he felt he was prepared for this case and, even in hindsight, saw no way that more preparation would have assisted him in his defense of the Petitioner. He said that, while the victim in this case was a police officer, the evidence consisted primarily of the victim's

testimony.

The Petitioner contended that, had Counsel had more time, he would have been able to gather evidence to establish the presence of a fourth person in the car. Counsel, however, argued this to the jury in his opening statement, and then, considering the evidence that was presented at trial, he made the strategic decision to place the blame for the shooting on another person who was confirmed to be present in the car. We fail to see how more time for Counsel to plan would have changed this strategic decision.

We conclude that Counsel was not ineffective. Counsel was prepared and provided the Petitioner a good defense by highlighting for the jury the inconsistencies in the officers' statements as well as the victim's failure to positively identify the Petitioner before trial. Further, we agree with the post-conviction court that the Petitioner has failed to prove prejudice. The Petitioner is not entitled to relief on this issue.

2. Investigation

The Petitioner next contends that Counsel was ineffective for failing to adequately prepare for trial by: failing to adequately review the discovery packet with him; failing to interview any witnesses; failing to hire a private investigator; and by failing to request that the State perform "elimination print tests that could have proved helpful" to the Petitioner. Additionally, the Petitioner contends that Counsel should have requested that the gun be tested for fingerprints and that Counsel should have objected to the admission of an undisclosed photograph of the Petitioner. The Petitioner contends that, had Counsel interviewed the State's witnesses, he would have been better able to cross-examine them about inconsistent statements. Further, he asserts that, had Counsel been more familiar with the discovery packet, Counsel could have objected to the admission of the photograph of the Petitioner in handcuffs, and Counsel would have been better able to assert the theory of defense decided upon by Counsel and the Petitioner.

Addressing each argument in turn, we first conclude that Counsel was not ineffective in his review of the discovery packet. The Petitioner has not presented sufficient proof that Counsel failed to review this information, and he has not shown how he was prejudiced in this regard. About the photograph of the Petitioner in handcuffs, Counsel testified that he did not object because he used this photograph to show that the police had beaten the Petitioner. Counsel thought that, because of this picture, the Petitioner was found not guilty of the assault charge that he faced. We conclude that Counsel did not err when he failed to object to the introduction of this photograph.

The Petitioner has failed to show what information would have been gleaned from the hiring of a private investigator. Counsel conducted his own investigation of the scene and reviewed the evidence to be presented. From the trial transcript, it is apparent that he adequately impeached all the State's witnesses. He effectively cross-examined the victim, highlighting for

the jury that the victim had not only *not* identified the Petitioner but had also misidentified two other suspects at the hospital. Counsel was not ineffective in this regard.

The Petitioner contends that, had Counsel interviewed the witnesses, Counsel would have better been able to cross-examine witnesses. Reviewing the trial transcript, of which we took judicial notice, Counsel thoroughly and competently cross-examined all the State's witnesses, including the victim. We fail to see how interviewing the witnesses before trial would have benefitted the Petitioner's case or changed the outcome.

The Petitioner contends that Counsel was ineffective for failing to request that the State perform "elimination print tests that could have proved helpful" to the Petitioner. The Petitioner has presented no evidence about what the test results of such a test would be. He cannot prove that he was prejudiced by the lack of such testing when he has not shown what the test results would have shown. The Petitioner is not entitled to relief on this issue.

3. Discussion of Defense Strategies and Tactical Choices

The Petitioner next contends that he and Counsel failed to pursue their agreed-upon defense strategy of relying on Hazlitt's statement to establish Kenny Mooreland's presence in the car and argue that Mooreland shot the victim. Counsel determined that there was no, or very little, evidence to support a fourth person being in the car. Counsel made a strategic decision to place the blame on Hazlitt and to maintain that the Petitioner was not the shooter. The Petitioner faults this decision, saying that it was unsupported by other evidence presented at trial.

We conclude that this was clearly a strategic decision on Counsel's part. Further, Counsel is not required to discuss with the Petitioner every decision made during trial. While open communication is necessary, Counsel need not discuss his strategy for cross-examination with his client. The Petitioner alleged that he did not learn that Counsel intended to call no witnesses until Counsel rested. Counsel, having deemed his cross-examination of the State's witnesses successful, felt that it was a better strategy to rest than call more witnesses. This is also a strategic decision. The Petitioner failed to provide the court with the testimony of the witnesses he contended Counsel should have called at trial. Therefore, while we also conclude Counsel's representation did not fall below an objective standard of reasonableness in this regard, we conclude that the Petitioner has not proven that he was prejudiced. The Petitioner is not entitled to relief on this issue.

B. Right to Speedy Trial and Effective Assistance of Counsel

The Petitioner contends that he was forced to choose between asserting his right to a speedy trial and to the effective assistance of counsel. He argues the trial court forced this decision upon him because his speedy trial motion would have been weakened if he asked for a continuance to allow Counsel more time to prepare for trial. The State counters that this Court previously determined that the Petitioner was not denied his right to a speedy trial. Further, it

contends that Counsel was effective. Therefore, it concludes the Petitioner is not entitled to relief. We agree with the State.

This Court did, in fact, conclude that the Petitioner had not been denied his right to a speedy trial. *Lewis*, 2006 WL 2738160, at *2. We held

[T]he trial court did not err in denying the Defendant's motion because the reasons for the trial delay were neutral, the Defendant agreed to or requested all of the continuances, the Defendant's demand for a speedy trial was negated by his subsequent requests for continuances, and the Defendant did not suffer actual prejudice from the delays.

Id. Further, as stated above, we conclude that the Petitioner was not denied the effective assistance of counsel. The Petitioner was afforded effective counsel and he was not prejudiced by any delay in his trial. Accordingly, he is not entitled to relief on this issue.

III. Conclusion

After a thorough review of the record and the applicable law, we conclude that the Petitioner is not entitled to post-conviction relief. As such, we affirm the post-conviction court's judgment.

ROBERT W. WEDEMEYER, JUDGE